Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 2000

KINROSS COPPER CORPORATION, a foreign corporation,

Petitioner,

v.

STATE OF OREGON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Phillip D. Chadsey*
Jerry R. Fish
Michael R. Campbell
David E. Van't Hof
James N. Westwood
**Counsel of Record*
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204-1268
(503) 294-9376
Counsel for Petitioner

September 14, 2000

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FILED: May 19,1999

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

KINROSS COPPER CORPORATION,

Appellant,

v.

STATE OF OREGON,

Respondent.

(960906900; CA A98316)

Appeal from Circuit Court, Multnomah County.

Henry Kantor, Judge.

Argued and submitted May 13, 1998.

Before Landau, Presiding Judge, Deits, Chief Judge,
and Wollheim, Judge.

LANDAU, P.J.

Affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

[ ] No costs allowed.
[x] Costs allowed, payable by: Appellant
[ ] Costs allowed, to abide the outcome on remand, payable by:

LANDAU, P. J.

In this inverse condemnation case, plaintiff Kinross Copper Corporation seeks compensation for the value of its unpatented mining claims, which it contends has been reduced to zero as a result of the state's denial of a permit to discharge wastewater that would result from plaintiff's proposed mining operations. Plaintiff alleged a right to compensation under the takings clauses of both the federal and state constitutions. The trial court entered summary judgment in favor of the state on both claims. We affirm.

The parties stipulated to the relevant facts. In 1975, Amoco Minerals Company (Amoco) staked unpatented mining claims in the Cedar Creek Valley of the North Santiam River Subbasin in the Willamette National Forest. An "unpatented" mining claim refers to a possessory interest in minerals only, with the federal government retaining ownership of the land on which minerals may be located. *See*

generally 4 *American Law of Mining* § 110.02(1)(b) (2d ed 1998). Individuals who hold such claims have the exclusive right to possession and enjoyment over them, "so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title * * *." 30 USC § 26 (1994). To acquire an unpatented mining claim, it is necessary to discover a valuable mineral deposit. 30 USC § 22 (1994). To hold the claim, it is necessary to establish that the mineral deposit can be extracted, removed, and marketed at a profit. *See generally Chrisman v. Miller*, 197 US 313, 322-23, 25 S Ct 468, 49 L Ed 770 (1905). In 1976, Amoco discovered a body of copper ore on its claims.

In 1977, the Oregon Environmental Quality Commission (EQC) promulgated OAR 340-41-470(1), commonly known as the "Three Basin Rule." That administrative rule prohibits "any new or increased waste

discharges" to the Clackamas, McKenzie, or North Santiam River Subbasins.

In 1989, Amoco leased the unpatented mining claims to plaintiff. Two years later, plaintiff developed a plan of operations for a copper ore mining project. The plan required plaintiff to discharge groundwater pumped from the mine, along with other wastewater, into the North Santiam River Subbasin. The plan included obtaining applicable permits, including a National Pollutant Discharge Elimination System (NPDES) permit under the applicable state and federal clean water laws.

In 1992, plaintiff submitted to the Oregon Department of Environmental Quality (DEQ) an application for an NPDES permit. DEQ conducted various tests and concluded that, under the terms of plaintiff's proposed plan of operations, the discharge would not cause applicable water quality standards to be violated. DEQ also concluded that

alternatives to discharging wastewater from the proposed mining operation were not viable and that, without an NPDES permit, plaintiff would not be able to develop and operate its proposed copper mine. In 1995, however, DEQ denied plaintiff's application for an NPDES permit on the ground that the Three Basin Rule prohibits *any* new waste discharges into the North Santiam River Subbasin. Plaintiff requested a contested case hearing before the EQC on the denial of the permit application. In 1996, EQC issued a final order denying plaintiff's application.

Plaintiff then initiated this action for damages. Plaintiff alleged claims for relief under the takings clauses of both the state and federal constitutions. Plaintiff moved for summary judgment on its federal takings claim on the ground that the denial of its NPDES permit rendered its unpatented mining claims entirely valueless and thus constituted a *per se* taking. The state moved for summary judgment on both

claims on the ground that the denial of the NPDES took no property right of plaintiff's. According to the state, because unpatented mining claims are held subject to state regulation, plaintiff never had the right to develop its claim in violation of state law.

The trial court denied plaintiff's motion, granted the state's motion, and entered judgment for the state on both claims. In a letter opinion, the trial court explained that, because holding an unpatented mining claim requires proof that the claim continues to be marketable, and, because state regulations render plaintiff's claims unmarketable, plaintiff's mining claims were "extinguished," leaving plaintiff with no property right that could be taken. The extinguishment of the claim did not amount to a taking, the court held, because unpatented mining claims constitute a unique form of property right that--by definition--is subject to state and federal regulatory authority and is more appropriately

regarded as analogous to a contract right that is subject to a condition subsequent. The trial court cited as authority for its conclusion a law review article, Michael Graf, *Application of Takings Law to the Regulation of Unpatented Mining Claims*, 24 Ecology L Q 57 (1997).

On appeal, plaintiff assigns error to both summary judgment rulings. It contends that the trial court erred in adopting the reasoning of the cited law review article because it is contrary to nearly a century of takings case law. Amicus Northwest Mining Association expands on that contention, arguing that unpatented mining claims have long been recognized as property subject to the protections of the federal and state constitutions.

The state concedes that the trial court's rationale is at odds with "traditional takings analysis." It nevertheless contends that the trial court correctly concluded that plaintiff lost no property right because, among other things, plaintiff

never had the right to discharge wastewater into a state waterway. Amicus North Santiam Watershed Council (Council) expands on that alternative argument and asserts that holders of unpatented mining claims do not have a property right to discharge wastes into state rivers.

Plaintiff responds that the argument is not "preserved" and, in any event, is incorrect. According to plaintiff, it does indeed have a right to discharge water from its mining operation, first, because the federal Mining Act of 1866 recognized a miner's rights through custom and other laws to use water on federal lands and, second, because state law provides that industrial water users have the right to use up to 5,000 gallons of groundwater per day without a permit.

In reviewing the trial court's rulings, we determine whether there is a genuine issue of material fact and whether the prevailing party is entitled to judgment as a matter of law. ORCP 47 C. In this case, the facts are undisputed; the sole

question before us is whether the trial court correctly concluded that the state was entitled to judgment as a matter of law, that is, that plaintiff suffered no taking of property under the state or federal constitutions.

Article I, section 18, of the Oregon Constitution provides that "[p]rivate property shall not be taken for public use, * * * without just compensation[.]" The Fifth Amendment to the United States Constitution likewise prohibits the taking of private property for public use without just compensation. US Const, Amend V.

Identifying the extent to which governmental action short of outright physical acquisition of private property may constitute a taking of property under the state or federal constitutions has proved to be extraordinarily vexing for the courts. Various--sometimes even conflicting--tests have been invoked in countless cases over the last 75 years since Justice Holmes first penned the familiar, albeit cryptic, *dictum* that

"while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Penna. Coal Co. v. Mahon*, 260 US 393, 415, 43 S Ct 158, 67 L Ed 322 (1922).

But through the years and the cases, a few principles safely may be asserted as having been settled. Two such principles pertain to this case. The first is that, regardless of the difficulty of describing the exact point at which governmental action is transformed from constitutional regulation to unconstitutional taking, under both state and federal constitutions, government action that deprives property of *all* value without compensation is an unconstitutional taking. The precise formulation varies from case to case, but the gist is the same. Thus, under the Oregon Constitution, an action for inverse condemnation may be maintained to recover damages against a governmental agency that has taken action that has the effect of depriving

the owner of "all economically viable use" of its property. *Boise Cascade Corp. v. Board of Forestry (S42159)*, 325 Or 185, 197-98, 935 P2d 411 (1997). Similarly, under the federal constitution, an action for inverse condemnation may be maintained for damages against a government agency that has taken action that has deprived the owner of "all economically beneficial use" of the property. *Lucas v. South Carolina Coastal Council*, 505 US 1003, 112 S Ct 2886, 120 L Ed 2d 798 (1992).

The second settled principle of takings law is that, even if government action might otherwise constitute a taking of property, it will not if it is shown that what the government prohibits does not amount to a private property right in the first place. Said another way, an owner cannot maintain an action for loss of a property right that it did not ever have. Thus, for example, the Oregon Supreme Court held that owners of "dry sand" areas of the Oregon coast cannot be

heard to complain of the loss of the right to exclude the public from those areas, because it is a "right" that they never possessed. *Stevens v. City of Cannon Beach*, 317 Or 131, 136-43, 854 P2d 449 (1993), *cert den* 510 US 1207 (1994); *see also Northwest Natural Gas Co. v. City of Portland*, 300 Or 291, 312, 711 P2d 119 (1985) (public utility could not maintain takings claim for costs of relocating utility facilities to make room for light-rail construction because utilities never possessed a property right to locate their facilities at any particular place). Similarly, the United States Supreme Court explained that even regulation that deprives land of all economically beneficial use will not give rise to takings liability "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 US at 1027.

In this case, plaintiff contends that the denial of its application for an NPDES permit as a precondition to conducting a copper mining operation constitutes a taking of property under both state and federal constitutions. It is stipulated that the effect of the denial deprives plaintiff's unpatented mining claims of all of their economic value. The only question before us is whether, as the United States Supreme Court phrased it in *Lucas*, "the proscribed use interests were not part of [plaintiff's] title to begin with." 505 US at 1027.

It bears emphasis that the focus of the inquiry is the extent to which the "proscribed use" is part of plaintiff's title. That is to say, the determinative inquiry is whether *what the government has prohibited* is itself a property right. The matter bears emphasis because it is not the principal focus of plaintiff's briefing and argument. Plaintiff argues that it has suffered an uncompensated taking, because it has been

deprived of the right to mine copper as otherwise permitted by its unpatented mining claim. But the decision of the EQC did not prohibit plaintiff from mining. It prohibited plaintiff from discharging wastewater into the North Santiam River Subbasin. In consequence, to maintain its takings claim against the state, plaintiff must show that the denial of its NPDES permit application deprived it of a property right; that is to say, plaintiff must show that it had a right to discharge its wastewater into a river of the state. If plaintiff did not have the right to discharge wastewater into the river basin, it cannot complain that it has suffered an uncompensated taking.

Plaintiff initially contends that it should not have to address that question, because it was not the focus of the trial court's decision and was not argued by the state below. As the state correctly asserts, however, a trial court may be "right for the wrong reason," that is, we may affirm on grounds

different from those on which the trial court based its decision, so long as there is evidence in the record to support those alternate grounds. *State v. Nielsen*, 316 Or 611, 628-32, 853 P2d 256 (1993); *State v. Lawson*, 127 Or App 392, 395, 872 P2d 986, *rev den* 320 Or 110 (1994).

In any event, the argument that the state and the Council raise in support of the trial court's decision varies only slightly from what the state asserted below. Before the trial court, the state asserted that plaintiff suffered no taking, because no property right had been taken, and it asserts the same theory on appeal. *See State v. Hitz*, 307 Or 183, 188, 766 P2d 373 (1988) (drawing distinction between raising an issue at trial, identifying a source for a claimed position, and making a particular argument). We turn, then, to the merits of the parties' arguments about whether the denial of an application for an NPDES permit to discharge mining

wastewater constitutes a deprivation of a private property right.

At common law, an owner of land possessed a right to the natural flow of water running through the owner's land. The right was an incident of ownership of the land and did not depend on the owner's actual appropriation of the water for beneficial use. *See generally* Joseph W. Dellapenna, *The Right to Consume Water Under "Pure" Riparian Rights*, 1 WATERS AND WATER RIGHTS 205, 219 (Robert E. Beck ed 1991).

During the nineteenth century, the federal government began to permit the mining of public lands in the West. Because the government retained title to the land itself, the traditional rules of riparian rights did not readily apply to the use of waters running through the mining claims. Mining customs developed over time, however, to fill the need of the times. One such custom was that rights to use water in

mining operations could be obtained as an incident of the mining activity and that competing claims to the use of the water would be determined by the time of actual appropriation of the water for that use. *See generally* John N. Pomeroy, *A Treatise on the Law of Water Rights* § 14 (1893) ("Water was an indispensable requisite for carrying on mining operations; a permanent right to use certain amounts of water was as essential as the permanent right to occupy a certain parcel of mineral land."). That right included the right to discharge into a stream, although the right of discharge did not include mining debris that could wash on to the land of another. *See, e.g.*, *Carson v. Hayes*, 39 Or 97, 105-06, 65 P 814 (1901) ("The doctrine of the authorities is that each mine owner or proprietor must take care of his own mining debris, and he can acquire no right, by custom or otherwise, to use the land of his neighbor as a dumping ground, without his consent, either by carrying and depositing

depositing the debris thereon, or by casting it into the stream, and allowing it to be washed down by the force of the current[.]").

In time, western states began to adopt the doctrine of "prior appropriation" as a general rule of water rights. Under the rule of prior appropriation, water rights are determined not as an incident of land ownership, but as a function of actual diversion of water to a recognized beneficial use. *See generally*, Wells A. Hutchins, US Dep't of Agriculture, 1 *Water Rights Laws in the Nineteen Western States*, 440-42 (1971). Oregon law during the years following statehood began with adherence to the common law of riparian rights, but, by the turn of the century, the courts moved toward the rule of prior appropriation. *See generally* Janet C. Neuman, *Oregon*, 6 WATERS AND WATER RIGHTS 699 (Robert E. Beck ed 1991); Wells A. Hutchins, *The Common-Law*

Riparian Doctrine in Oregon: Legislative and Judicial Modification, 36 Or L Rev 193, 196-97 (1957).

Congress recognized the rule of prior appropriation in the Mining Act of 1866, 30 USC § 51 (1994), which provides:

> "Whenever, by priority of possession, rights to the use of water for mining * * * have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same * * *."

See also Atchison v. Peterson, 87 US (20 Wall) 507, 514-15, 22 L Ed 414 (1874). Congress reaffirmed that recognition in the Mining Act of 1870, 30 USC § 52.

The basic grant of unpatented mining claims originated in the Mining Law of 1872, 30 USC §§ 22-47 (1994). *See generally* 4 *American Law of Mining* § 110.02 (1998). The 1872 law effected no change to the preexisting recognition of the state water rights rules pertaining to

mining claims. A later enactment did, however. The Desert Land Act of 1877 permits the entry and reclamation of "desert" land with a proviso that the right to the waters by a claimant depends on prior appropriation, subject to an additional proviso:

> "[A]ll surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

43 USC § 321 (1994).

In *Hough v. Porter*, 51 Or 318, 95 P 732, 98 P 1083 (1909), the Oregon Supreme Court held that the second proviso had the effect of severing title to all public land in states covered by the 1877 Act, not merely "desert" land. The court reasoned that the first proviso was sufficient to protect those claiming rights to desert land, and that, by adding the second proviso, which reserved all water over and

above such desert land appropriations, Congress apparently intended to protect the public's right to water on all public lands in all desert states, including Oregon. *Id.* at 386-87. The Oregon court's construction of the Desert Land Act of 1877 ultimately was upheld in *Power Co. v. Cement Co.*, 295 US 142, 55 S Ct 725, 79 L Ed 1356 (1935), in which the United States Supreme Court held that, in enacting that second proviso, Congress effectively severed title to all public land--not merely "desert" land--from title to the nonnavigable waters on that land:

> "By its terms, not only all surplus water over and above such use as might be appropriated and used by the desert-land entrymen, but 'the waters of all lakes, rivers, and other sources of water supply upon the public lands and not navigable' were to remain 'free for the appropriation and use of the public for irrigation, mining and manufacturing purposes.' If this language is to be given its natural meaning, and we see no reason why it should not, it effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself. From that premise, *it follows that*

> *a patent issued thereafter for lands in a desert-land state or territory, under any of the land laws of the United States, carried with it, of its own force, no common-law right to the water flowing through or bordering upon the lands conveyed.*
>
> "* * * * *
>
> "As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. The fair construction of the provision now under review is that *Congress intended to establish the rule that for the future the land should be patented separately; and that all nonnavigable waters thereon should be reserved for the use of the public under the laws of the states and territories named.*"

Id. at 158-62 (emphasis added; citations omitted). Thus, for claims granted after 1877, the property granted by the federal government under the Mining Act of 1872 consists of the unpatented mining claim itself. No water rights are granted as part of the claim. Water rights must be obtained as provided in the water rights laws of the state in which the site of the claim is located. *Id.*

As noted, nineteenth-century Oregon case law reflected a transition from the common law of riparian rights to the rule of prior appropriation. In 1909, however, the Oregon legislature enacted a comprehensive statute that significantly altered the nature of water rights in this state. Or Laws 1909, chs 216 & 221. The legislature began by declaring--in a provision that survives to this day--that "[a]ll water within the state from all sources of water supply belongs to the public." ORS 537.110. The legislature then expressly recognized prior appropriation as the exclusive means of acquiring water rights in this state and established a comprehensive permit system for appropriating water. *See generally* Hutchins, 36 Or L Rev at 204-05. The details of the permitting process have been altered many times since then. *See generally* Gail L. Achterman and Peter D. Mostow, *Senate Bill 674: Increasing the Flow Rate of Oregon's Water Rights Permitting Process*, 32 Willamette L Rev 187

(1996). But the process continues to be the exclusive mechanism for permitting use of and establishing property rights in the waters within the state. *See generally* ORS ch 537.

Meanwhile, in 1972, Congress enacted the federal Clean Water Act, which, among other things, prohibits the discharges of pollutants--including any industrial wastes--into the waters of the United States without first obtaining an NPDES permit. 33 USC §§ 1311(a), 1342(a) (1994). States are permitted to administer the NPDES permit program, 33 USC § 1342(b) (1994), and Oregon has elected to do so. ORS 468B.050 expressly provides that, subject to enumerated exceptions, no person may discharge any waste into the waters of the state without obtaining a permit from DEQ. Nothing in either the federal or state laws, however, confers a property right to obtain a permit or conduct any activities for which a permit is required.

In the light of the foregoing authorities, it becomes clear that plaintiff's contention that it has a right to discharge wastewater into the North Santiam River Subbasin is untenable. Plaintiff's unpatented mining claims came into existence in 1976, nearly 100 years after the enactment of the Desert Lands Act of 1877, which severed water rights from the grant of an unpatented mining claim. As a result, when the unpatented mining claims came into existence, no water rights were conferred with them. If plaintiff has a private property right to discharge wastewater into the publicly owned waters of the state, the right must have come into existence separately after compliance with state law regarding the creation and recognition of state water rights. There is no evidence in the record--and plaintiff makes no contention that any such evidence exists--that plaintiff has obtained a water rights permit or certificate after complying with the requirements of the statutory permit process.

Plaintiff insists that the right to discharge into the North Santiam River Subbasin was created by common law and recognized by the Mining Act of 1866. Plaintiff, however, neglects to address the effect of the Desert Land Act of 1877, which--at least as to mining claims that were acquired after the enactment of that statute--severed water rights from the other rights conferred by the granting of the mining claims and required that water rights be obtained in accordance with applicable state water laws.

Plaintiff contends that, in any event, even under current state water law, it is entitled to use up to 5,000 gallons of ground water without a permit under ORS 537.545(1). That statute provides that, subject to exceptions not pertinent to this case:

> "[N]o registration, certificate of registration, application for a permit, permit, certificate of completion or ground water right certificate * * * is required for the use of ground water for:

"* * * * *

"(f) Any single industrial or commercial purpose in an amount not exceeding 5,000 gallons a day[.]"

Plaintiff's contention is easily answered. By its terms, the statute permits the *consumption* of ground water. Even assuming that it applies to a mining operation, the statute does not permit the *discharge* of anything into a river of the state.

In short, plaintiff's takings claim is predicated on the loss of a right that it never possessed, namely, the "right" to discharge mining wastes into the waters of the state. It necessarily follows that, in denying plaintiff's application for a permit to conduct that activity, the state has not effected a taking of private property within the meaning of either the state or federal constitutions. We therefore hold that, in concluding that the denial of plaintiff's application for an NPDES permit did not effect an uncompensated taking of

property, the trial court was correct, albeit for a different reason from the one that the trial court adopted. In so holding, we express no opinion on the rationale that the trial court did adopt.

Affirmed.

FILED: October 13, 1999

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

KINROSS COPPER CORPORATION,

Appellant,

v.

STATE OF OREGON,

Respondent.

(960906900; CA A98316)

Appeal from Circuit Court, Multnomah County.

Henry Kantor, Judge.

On appellant's petition for reconsideration filed June 2, 1999, and respondent's response to petition for reconsideration filed June 9, 1999. Opinion filed May 19, 1999. 160 Or App 513, 981 P2d 833.

Before Landau, Presiding Judge, and Deits, Chief Judge, and Wollheim, Judge.

LANDAU, P. J.

Petition for reconsideration allowed; opinion adhered to.

LANDAU, P. J.

Plaintiff Kinross Copper Corporation petitions for reconsideration of our opinion affirming the trial court's entry of summary judgment dismissing plaintiff's state and federal takings claims based on the denial of a permit to discharge mining wastewater into a river of the state. *Kinross Copper Corp. v. State of Oregon*, 160 Or App 513, 981 P2d 833 (1999). Plaintiff contends that, in our opinion, we erred in construing or applying the law. ORAP 6.25(1)(e). We allow the petition, but adhere to our opinion for the reasons that follow.

Plaintiff alleged that it suffered an uncompensated taking of property when the state denied it a permit to discharge groundwater and other wastewaters from its mining operation into the North Santiam River Subbasin. Plaintiff alleged that, without the ability to discharge into the river, its unpatented mining claim had no value. The trial court

entered summary judgment in favor of the state. On appeal, plaintiff argued that the trial court erred because it was undisputed that the denial of the permit deprived its claim of any use or value. The state argued that the trial court was correct because, among other things, there can be no taking of a right that plaintiff never possessed, and, plaintiff never possessed the right to discharge wastewater into a river of the state. Plaintiff replied that, indeed, it did have a right to discharge wastewater into a river of the state because, under ORS 537.545(1), plaintiff has the right to discharge up to 5,000 gallons of groundwater per day.

We agreed with the state. We held that ORS 537.545(1) did not have the effect of granting a property right to discharge wastewater:

> "By its terms, the statute permits the *consumption* of ground water. Even assuming that it applies to a mining operation, the statute does not permit the *discharge* of anything into a river of the state."

Kinross Copper Corp., 160 Or App at 525 (emphasis in original). We then concluded that, having lost no property right, plaintiff suffered no taking. *Id.* at 525-26.

On reconsideration, plaintiff contends that we correctly determined that ORS 537.545(1) does not grant a right to discharge wastewater. Nevertheless, they contend that they have that right at common law. According to plaintiff, all property owners have a common-law right of drainage. In fact, it argues that it does not even need to obtain a permit to exercise that right. Thus, plaintiff concludes, although we correctly determined that there can be no taking of a property right never held, in this case, it does possess such a right.

At the outset, we note that plaintiff did not make that argument in its briefs and previously cited none of the authorities on which it now relies. Plaintiff argued that it obtained the right to discharge its wastewater by virtue of its

water rights. We explained why that was incorrect as a matter of law. Now plaintiff argues that it obtained the right to discharge its wastewater at common law, independent of its water rights. If a contention was not raised in the brief, however, it is not appropriate to assert it on reconsideration. *Bergman v. Holden*, 122 Or App 257, 260, 857 P2d 217, *rev den* 318 Or 170 (1993) ("Ordinarily, a contention not raised in the original brief will not be considered on reconsideration.").

In any event, plaintiff has failed to demonstrate that its new argument is correct. According to plaintiff, the owner of an unpatented mining claim has a right to discharge wastewater into a river of the state without first obtaining a permit from the state to do so. Plaintiff bases that assertion on two opinions: *Harbison v. City of Hillsboro*, 103 Or 257, 204 P 613 (1922), and *Garbarino v. Van Cleave*, 214 Or 554, 330 P2d 28 (1958). Neither opinion stands for the

proposition for which it is cited. Both concern the rights of landowners to allow natural drainage flow onto the property of another and the extent to which that natural drainage can be artificially channeled. Neither speaks to the rights of property owners generally, much less to the rights of owners of unpatented mining claims particularly, to discharge wastewater into the waters of the state.

Plaintiff's argument is particularly difficult to understand given its logical implications. If plaintiff has a common-law right to discharge wastewater into the rivers of the state without a permit, then it never needed to apply for a permit to conduct its mining operation. Plaintiff does not explain--and we do not understand--how it can be a taking of property to deny a permit that plaintiff did not need in the first place.

Petition for reconsideration allowed; opinion adhered to.

IN THE SUPREME COURT OF THE
STATE OF OREGON

KINROSS COPPER CORPORATION,	)	ORDER DENYING REVIEW
Appellant/Petitioner	)	
	)	CA A98316
v.	)	SC S46982
STATE OF OREGON,	)	
Respondent/Respondent.	)	

The Court has considered the petition for review and orders that it be denied.

DATE: February 29, 2000.

/S/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

KULONGOSKI, J. NOT PARTICIPATING
GILLETTE AND VAN HOOMISSEN, JJ.
WOULD ALLOW

IN THE SUPREME COURT OF THE
STATE OF OREGON

KINROSS COPPER CORPORATION,	)	Multnomah County Circuit Court No. 960906900
Plaintiff-Appellant, Petitioner on Review,	)	SC S46982 CA A98316
v.	)	
STATE OF OREGON	)	ORDER DENYING RECONSIDERATION
Defendant-Respondent, Respondent on Review.	)	

Upon consideration by the court.

The Court has considered the petition for reconsideration and orders that it be denied.

Dated this 20th day of June 2000.

/S/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

Kulongoski, J., not participating

DISTRICT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

June 9, 1997

Re: Kinross Copper v. State of Oregon
Case No. 960906900

Dear Counsel:

Since the hearing in April, I have reread all of your materials (including those submitted after the hearing), conducted my own research and cogitated over the more difficult legal and factual issues presented by your cross-motions for summary judgment. I have drafted and rejected relatively lengthy findings of fact and conclusions of law. I now have decided to give you the rulings you need and to share my reasoning on a few key issues.

Plaintiffs motion for partial summary judgment is denied. Defendant's motion for summary judgment is granted.

As a preliminary, I have concluded that, for purposes of these motions, the law governing both the federal and state takings claims is the same on all essential issues. *See* Lucas v. South Carolina Coastal Council, 505 US 1003, 1116 (1992), *and* Boise Cascade Corp. v. Board of Forestry, 325 Or 185, 197-99 (1997).

The issue, or rather concept, I have struggled with most is whether plaintiff's unpatented mining claim is the type of interest which is subject to constitutional takings analysis. In general, unpatented mining claims are protected property interests. United States v. Locke, 471 US 84, 86 (1985). At the same time, an unpatented mining claim is nowhere close to a fee simple, as it appears to have a variety of conditions precedent and subsequent attached. Until recently, I have been unable to articulate what it is about plaintiff's unpatented mining claim which makes it, in my

view, a property interest which is *not* subject to constitutional takings protection.

With the assistance of a borrowed law clerk, I came across Graf, "Application of Takings Law to the Regulation of Unpatented Mining Claims," 24 Ecology L Q 57 (1997) ("Graf"). The author of this law review article put into words what I already had been thinking.

In my judgment, plaintiff's unpatented mining claim is conditioned upon compliance with authorized and applicable federal and state regulations. This is true for regulations which exist prior to the initial discovery as well as for some regulations which come into existence after discovery but before any mining is done. I qualify the second group of regulations because I believe that only regulations which are within the reasonable expectations of a reasonable owner of a mining claim (an objective test) necessarily attach

to the claim and become part of the property interest. Lucas at 1027.

It has been agreed between the parties that one of the elements of an unpatented mining claim is a "valuable discovery." I conclude that whether a discovery is valuable depends on the cost of complying with applicable regulations (as discussed above). In this case, the state's clean water regulations make plaintiff's predecessors' discovery far from valuable, "thereby extinguishing the 'property interest' necessary to bring a Fifth Amendment action." Graf at 113.

I could discuss the authorities you each presented as well as the authorities discussed in Graf. Instead, I refer you to primarily to the discussion at Graf at 112-28.

If my analysis of plaintiff's unpatented mining claim is in error, I would deny both parties' motions, although I might have made a few rulings which could have guided the trial judge. I recognize that this is inconsistent with my letter

ruling of December 24, 1996. However, I became convinced after rereading Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F3d 1422, 1428-34 (9th Cir 1996), that several jury questions would be presented.

Ms. Fjordbeck shall submit an order and a judgment after compliance with the applicable uniform and local rules.

Very truly yours,

/s/ Henry Kantor
Henry Kantor
District Court Judge

CIRCUIT COURT OF OREGON
MULTNOMAH COUNTY

KINROSS COPPER CORPORATION,	)	
Plaintiff,	)	No. 9609-06900
v.	)	ORDER
STATE OF OREGON, Defendant.	)	

This matter came before the court on Plaintiff's Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment. The court has considered the motions, memoranda, and supporting documents, as well as the arguments of counsel for the parties and the amicus, North Santiam Watershed Council.

It is hereby ordered as follows:

1. Defendant's Motion for Summary Judgment is granted.

2. Plaintiff's Motion for Partial Summary Judgment is denied.

3. This matter is dismissed.

Dated this 25th day of June, 1997.

/S/ Henry Kantor
Henry Kantor
Circuit Judge *pro tem*

CIRCUIT COURT OF OREGON
MULTNOMAH COUNTY

KINROSS COPPER CORPORATION, Plaintiff,	)	No. 9609-06900
v.	)	JUDGMENT
STATE OF OREGON Defendant.	)	

This court has granted Defendant's Motion for Summary Judgment. It is therefore ordered, adjudged, and decreed as follows:

Judgment is entered in favor of the Defendant, the State of Oregon, and against the Plaintiff, Kinross Copper Corporation.

Defendant may file its cost bill in accordance with ORCP 68.

Dated this 25th day of June, 1997.

/S/ Henry Kantor
Henry Kantor
Circuit Judge *pro tem*

IN THE SUPREME COURT OF THE
STATE OF OREGON

KINROSS COPPER CORPORATION,	)	Supreme Court No. 546982
Plaintiff-Appellant, Petitioner on Review,	)	Court of Appeals No. A98316
v.	)	(Multnomah County Circuit Court)
STATE OF OREGON,	)	TC No. 9609-06900
Defendant-Respondent/ Respondent on Review.	)	

PETITIONER ON REVIEW KINROSS COPPER CORPORATION'S PETITION FOR REVIEW

Petition for Review of the Opinion of the
Court of Appeals Affirming the Judgment
Entered in Multnomah County Circuit Court
on June 25, 1997 by the Honorable Henry Kantor

Opinion Filed: May 19, 1999
Reconsideration Allowed and
Opinion Adhered to: October 13, 1999
Author of Opinions: Landau, J.
Joined by: Deits, P.J., Wollheim, J.

A. PRAYER FOR REVIEW

Petitioner Kinross Copper Corporation ("Petitioner" or "Kinross") seeks review by this Court of the Opinion of the Oregon Court of Appeals dated May 19, 1999 and the Opinion on Reconsideration dated October 13, 1999. (Opinions are appended to this petition.)

B. LEGAL QUESTIONS PRESENTED

1. Did the court of appeals err in holding that Petitioner has no proprietary interest that was taken under either the Oregon or U.S. constitutions by a state regulation that prohibits Petitioner from discharging mining water into a neighboring stream to Petitioner's unpatented mining claim where the undisputed effect of the regulation is to prevent Petitioner from mining the claim and where mining undisputedly is the only

economically viable use of the unpatented mining claim?

2. a. Did the court of appeals err in holding that Petitioner has no right at common law to discharge or drain water from its unpatented mining claim into a neighboring stream where the discharge or drainage would not be deemed a common law nuisance?

   b. If Petitioner does have that common law drainage or discharge right, and loss of the right takes away all economically beneficial use of the mining claim, does the state effect a taking when by regulation it prevents Petitioner from exercising that right?

3. If enforcement of the state regulation in this case does not effect a permanent taking under the Oregon or U.S. constitutions, is the state regulation preempted by federal law and, if so, does Petitioner have a right to compensation for a temporary taking?

C. PROPOSED RULES OF LAW

1. When state regulation of water discharge has the effect of preventing a holder of an unpatented mining claim from mining the claim, that regulation causes a taking of the holder's property interest in the claim under both the Oregon and U.S. constitutions. This is true whether or not the claim holder has a separate property interest in discharging water into a neighboring stream.

2. a. A holder of an unpatented mining claim has a common law right to discharge mining water into a neighboring stream provided such discharge does not constitute a nuisance.

   b. A state regulation that bars all such discharges, so as to deprive the claim holder of all beneficial use of the claim, is a taking for which the claim holder must be compensated.

3. If no taking occurred under either the Oregon or U.S. constitutions, the state regulation as applied in this case is preempted by federal mining and land use law and Petitioner may recover for a temporary taking during the period in which the state regulation was wrongfully imposed.

D. REASONS FOR REVERSAL

An unpatented mining claim may only be used for mining. Consequently, a regulation that has the effect of making mining impossible and that is enacted after a proprietary interest in an unpatented mining claim has been established effects a taking of that proprietary interest. *See Skaw v. United States,* 740 F2d 932 (Fed Cir 1984), *cert den* 488 US 854 (1988). *Skaw* should be dispositive in this case. However, the court of appeals attempted to dodge *Skaw*[1] and the meat of the state and federal takings questions in this case by applying a legal theory not argued by the state:[2] that Kinross does not have a proprietary right or interest to

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[1] In fact, despite numerous citations to and discussion of *Skaw in* Kinross' appellate brief, the court of appeals never even mentioned *Skaw* in either of its opinions.

[2] The closest the state came to asserting this legal theory was to note in a footnote in its Respondent's Brief (page 21) in the court of appeals that Kinross had not established a right to use water at all (as opposed to discharge or drain water). The state conceded that it had failed to raise even that legal theory in the trial court.

discharge mining water into a stream of the North Santiam River subbasin and, consequently, that Kinross could not have had its property interest in an unpatented mining claim taken by a state regulation prohibiting such discharge. Kinross respectfully submits that the question whether Kinross has a proprietary right to discharge water into the North Santiam River subbasin misses the point. It is undisputed in this case that the *effect* of the regulation was to prevent Kinross from mining its leased unpatented mining claim. It also is undisputed in this case that mining the unpatented mining claim is its only economically viable use. Under well-established federal and state takings analysis, that is all that is necessary to establish a compensable taking.

The court of appeals opinion creates a new takings criterion never before applied in either Oregon or any other state or federal jurisdiction. Namely, the court of appeals suggests that if a state (or local) law or regulation is drafted

in such a way that it does not expressly prohibit a landowner or lessee's use of property, and instead the law or regulation merely has the *effect* of making such use impossible, then no constitutional taking can occur. Such a conclusion welcomes state and local jurisdictions to draft creative laws that only have the effect of eliminating all economically beneficial use of property without expressly doing so. The court of appeals cited to no existing case law to support its novel legal theory. Nor does any exist. It is contrary to established takings principles; the issue is one of causation. *Armstrong v. United States*, 364 US 40, 46-48, 80 S Ct 1563, 4 L Ed 2d 1554 (1960) ("The total destruction by the Government of all value of [the property interest] has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure. Before the [property interest was] destroyed, the [plaintiffs] admittedly had compensable property. Immediately afterwards, they had

none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the [property] * * *."). Both this Court and other courts have found takings under either state or federal constitutions under circumstances analogous to this case.

In *Boise Cascade Corporation v. Board of Forestry (S42159)*, 325 Or 185, 197, 935 P2d 411 (1997), this Court held that, under the state takings clause, a taking is established when a property owner shows that "the application of the government's particular choice deprives the owner of all economically viable use of the property." That test did not exclude from takings those governmental regulations (choices) that *indirectly* prohibit all economic use of a landowner's property. To the contrary, the governmental regulation at issue in *Boise Cascade* protected spotted owl and its habitat, in part, from "`disturbances resulting from

[logging] operation[s].'" *Id.* at 188 n 5 (citation omitted). The regulation did not directly prohibit logging in that context, it merely prohibited activities that would disturb the spotted owl. Nonetheless, because logging cannot be done without eliminating its habitat, including the prey necessary for its survival, the effect of the regulation was to prevent the timber company from being able to log its property. This Court had no difficulty in concluding that the timber company stated a claim for relief under Article I, section 18, of the Oregon Constitution. *See also Stoddard v. Western Carolina Regional Sewer Auth.*, 784 F2d 1200 (4th Cir 1986) (holding under South Carolina constitution that municipality's discharge of noxious odors that created awful smell on landowner's property constituted taking and not inquiring into whether landowner had proprietary interest in air).

Similarly, the Federal Circuit has held that a denial of a permit to fill wetlands can effect a taking of a landowner's property under the Fifth Amendment. *Florida Rock Industries, Inc. v. U.S.*, 18 F3d 1560 (Fed Cir 1994); *see also Palm Beach Isles Associates v. U.S.*, 42 Fed Cl 340 (1998) (applying federal takings analysis to denial of dredge and fill permit); *Plantation Landing Resort, Inc. v. U.S.*, 30 Fed Cl 63 (1993) (same; concluding that no taking occurred because denial of permit did not deny all economically beneficial use of property). The *Florida Rock* court did not inquire into whether the property owner had a proprietary interest in the wetlands, which are classified as waters of the United States. In *Holden v. U.S.*, 38 Fed Cl 732 (1997), the court indicated that the closure of a road that has the effect of preventing access to an unpatented mining claim can constitute a taking of the property right in the mining claim even though the miner has no property interest in the road

itself. There simply is no requirement under either state of federal takings analysis that a state or local regulation must expressly prohibit one's use of a proprietary interest in order to effect a taking. Where the effect of the regulation is to make impossible any economic use of a property interest, a taking can result, and a taking did result in this case.

Assuming arguendo that the court of appeals correctly looked to whether Kinross had a proprietary right to discharge mining water into a river or stream of the state, the court of appeals reached the wrong conclusion. As Kinross argued first in its Opening Brief (page 19)[3] and later in its Petition for Reconsideration, a property owner has a common law right to discharge or drain water (including mine

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[3] The court of appeals is either too demanding or simply mistaken to say that Kinross failed to argue the point in its Opening Brief. (Opinion on Reconsideration at 2.) In any event, since the court of appeals decided the case on a legal theory not raised by the parties, Kinross should be allowed to respond to the legal theory on reconsideration and before this Court.

water) from his or her property into a watercourse, so long as such action does not constitute a nuisance to other property owners. *See Provolt v. Bailey,* 62 Or 58, 121 P 961 (1912) (mining discharge); *Carson v. Hayes,* 39 Or 97, 65 P 814 (1901) (same); *Harbison, et Ux. v. City of Hillsboro,* 103 Or 257, 204 P 613 (1922) (stormwater discharge); *Garbarino v. Van Cleave et al,* 214 Or 554, 330 P2d 28 (1958) (same); *see also Atuhinson v. Peterson,* 87 US (20 Wall) 507, 22 L Ed 414 (1874) (mining discharge); *see generally* Lindley on Mines § 841 (3d ed 1914).[4] It is undisputed that the proposed

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[4] Of course, this common law right can be limited by enactments of state and federal water quality standards *(i.e.,* regulations that may limit but do not prohibit uses of land) enacted *before* to a person's acquisition of a property right. In this case, the Clean Water Act and its clean water standards predated Kinross' property interest in the unpatented mining claim. Consequently, Kinross' common law right to discharge mining water into a stream is limited by the requirement to meet those water quality standards. The court of appeals erroneously interpreted Kinross' position in its Petition for Reconsideration to be that its common law right to discharge mining water somehow negated the need to secure an National Pollutant Discharge Elimination System permit. (Court of Appeals Opinion on Reconsideration at 3.) Kinross does not assert such a

discharge of water from Kinross' property would meet all state and federal water quality standards, and it is clear that the discharge would not constitute a nuisance at common law. In fact, it is undisputed that the mining discharge would have been undetectable 2,000 feet downriver of the discharge point. Consequently, the court of appeals erred in concluding that Kinross did not have a protected proprietary interest to discharge water from its unpatented mining claim into a stream. Because the court of appeals erred in concluding that Kinross did not have a proprietary interest in the discharge of mining water, it never carried out the necessary takings analysis under state and federal law.[5] Kinross relies on its

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claim.

[5] Under federal takings analysis, state nuisance law is the parameter by which a state regulation is to be evaluated. Where the state regulation is within the bounds of what could have been deemed a common law nuisance, then no taking can be established. But where the state regulation goes beyond the scope of common law nuisance, a taking may be found, provided the other takings criteria are met. *Lucas v. South Carolina Coastal Council*, 505 US 1003, 112 S Ct 2886, 120 L Ed 2d 798

briefing in the court of appeals to support its claim that enforcement of the state regulation resulted in a taking of Kinross' proprietary interest in the unpatented mining claim.[6] If review is allowed, Kinross will elaborate on this analysis.

Finally, even assuming arguendo that the court of appeals correctly concluded that the state regulation as applied in this case did not effect a taking because Kinross does not have a proprietary interest in discharging mining water into a neighboring stream, the state regulation would be preempted under federal law. The case law is clear that state

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(1992); *Loveladies Harbor, Inc. v. U.S.*, 28 F3d 1171, 1182 (Fed Cir 1994) (question is whether state's "regulatory imposition goes beyond the [state's] powers under common law nuisance doctrine * * *."); *Creppel v. U.S.*, 41 F2d 627, 631 (Fed Cir 1994) ("If state nuisance law does not justify the restraint, the court must proceed to the remaining [takings] criteria.").

[6] As was mentioned above, an unpatented mining claim may only be used for mining. Consequently, a regulation that has the effect of making mining impossible and that is enacted after a proprietary interest in an unpatented mining claim has been established effects a taking of that proprietary interest. *See Skaw v. United States*, 740 F2d 932 (Fed Cir 1984), *cert den* 488 US 854 (1988).

and local laws and regulations that prevent mining on federal lands are preempted by federal mining and land use laws. *See Elliott v. Oregon International Mining Co.*, 60 Or App 474, 654 P2d 663 (1982) (holding that county land use ordinance prohibiting surface mining on certain federal mining claims was preempted by Stock Raising Homestead Act). More recently, the Eighth Circuit held that a county ordinance that prohibited the issuance of any new or amended permits for surface metal mining within a certain area was preempted by the Federal Mining Act. *South Dakota Mining Assn, Inc. v. Lawrence County,* 155 F3d 1005 (8th Cir 1998).

During the time in which the state has applied the Three Basin Rule in such a way as to prevent mining on Kinross' unpatented mining claim, there would have been a temporary taking under the principles discussed by this Court in *Boise Cascade.*

E. FACTS RELEVANT TO REVIEW

The following facts are derived from the Stipulated Statement of Facts that the parties agreed to as part of their cross-motions for summary judgment and from additional facts that were stated in Kinross' Opening Brief in the court of appeals and were undisputed.

In 1989, Kinross (under its former name, Plexus, Inc.) acquired by lease the right to mine an unpatented mining claim in the Cedar Creek Valley of the North Santiam River subbasin in the Willamette National Forest. The unpatented mining claim was staked in 1975 by Cyprus Metals Exploration Corporation ("Cyprus") (formerly Amoco Minerals Co.), and Cyprus subsequently made a discovery of high-grade copper ore on the claims in 1976. Cyprus as the lessor of the subject claims retained the right to receive a royalty based upon the production from the mine.

In 1977, the Environmental Quality Commission (the "EQC") adopted OAR 340-041-470(1), which is commonly referred to as the Three Basin Rule. It prohibited wastewater discharges in the McKenzie, Clackamas, and North Santiam River subbasins. After promulgation of the Three Basin Rule and until the rule was amended in 1995, the Department of Environmental Quality ("DEQ") developed an administrative interpretation of the rule that allowed nonmajor discharges and issued at least 75 National Pollutant Discharge Elimination System ("NPDES") permits for what were deemed to be nonmajor discharges within the three rivers' subbasins. In 1991, Kinross received an NPDES permit for a discharge associated with its initial mine construction activities.

In 1992, Kinross applied for an NPDES permit to carry out its mining activities. DEQ worked with Kinross for more than a year with the intent of issuing the permit, until a

DEQ staff member questioned whether the Three Basin Rule did not prohibit issuance of the NPDES permit. DEQ sought advice from the Attorney General's office and was instructed that the Three Basin Rule prohibited all discharges, even those deemed to be nonmajor.[7] In a memorandum dated December 10, 1993, DEQ advised the EQC that an NPDES permit for Kinross' mining project could be issued under conditions where "there would be no measurable impact on the North Santiam River or the Little North Santiam River" but, nonetheless, DEQ concluded that it was prohibited from issuing the permit by the Three Basin Rule because the rule "prohibits development requiring a discharge permit, regardless of the impact on water quality." DEQ noted that "[a] few thousand feet downstream of the mixing zone, the

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[7] The state's counsel before the trial court acknowledged that the Three Basin Rule would prevent even the discharge of distilled water. (Transcript on Hearing on Summary Judgment Motions at 57 (Apr. 19, 1997).)

Kinross discharge would not be measurable" and that "the discharge load would not cause water quality standards to be violated." DEQ also noted that "[a] non-discharge alternative such as spray irrigation is not viable because of the steep terrain" and that "[d]ue to heavy precipitation in the area and the potential for encountering high volumes of groundwater during the mining operation, Kinross would not be able to develop and operate the mine without an NPDES waste discharge permit."

On March 21, 1995, DEQ denied Kinross' application for an NPDES permit. On April 7, 1995, Kinross requested a contested case hearing on the denial. The EQC issued a final order denying the application on August 30, 1996.

Kinross filed an inverse condemnation action in Multnomah County Circuit Court and the court granted the state's motion for summary judgement on June 26, 1997. The trial judge relied primarily on a law review article by

Michael Graf, titled "Application of Takings Law to the Regulation of Unpatented Mining Claims." That article argued, contrary to established law, that unpatented mining claims should be deemed a lesser property interest than is fee title and consequently that unpatented mining claims should not be compensated for a taking when after-enacted laws or regulations take away the opportunity to mine the claim.

Kinross appealed to the court of appeals on July 3, 1997. The court of appeals issued an opinion May 19, 1999 upholding the circuit court decision on different grounds. The court of appeals concluded that Kinross did not have a proprietary interest in discharging water that could have been taken by application of the Three Basin Rule and the resulting denial of Kinross' NPDES application. That legal theory had not been argued by the state or amicus below.

On June 2, 1999, Kinross petitioned for reconsideration in the court of appeals. Kinross asserted that

it does have a common law right to discharge water from its unpatented mining claim provided that such discharge does not constitute a nuisance. On October 13, 1999, the court of appeals allowed reconsideration and adhered to its prior opinion. In doing so, the court of appeals rejected Kinross' assertion and concluded that no such common law right exists.

F. IMPORTANCE OF REVIEW

This case presents an important issue concerning the takings clauses of both the Oregon (Article 1, section 18) and U.S. (Fifth Amendment through application of Fourteenth Amendment) constitutions. It also appears to conflict with prior decisions by this Court and by federal courts. See discussion above concerning *Boise Cascade*, 325 Or at 197, *Florida Rock*, 18 F3d 1560 and related cases.

The issue presented by this case will have widespread significance and will arise repeatedly in different contexts. The court of appeals opinion logically supports the proposition that a state or local regulation that does not directly prohibit any specific use of property cannot effect a taking under either state or federal law, even when the effect of the regulation is to prohibit a landowner from exercising any economically viable use of its property. For instance, under the court of appeals analysis, and contrary to existing case law, a state regulation prohibiting the fill of wetlands or the discharge of material into waters of the state under any and all circumstances could never effect a taking on the theory that a landowner does not have a proprietary interest in the waters of the state or of the United States. Similarly, a state regulation prohibiting all discharges into the air within a specific geographical area, even if such discharge meets all federal, state and local air quality standards, apparently could

not constitute a taking under any circumstance, because a landowner does not have a proprietary interest in the air or in discharging matter into the air.

The court of appeals decision if unaltered by this Court will also modify the common law. Henceforth, the long-established right of miner at common law to nonnuisance discharge or drainage of water into a stream will be subject to elimination not by legislative act but by administrative reinterpretation of an administrative rule. The court of appeals' justification of the regulation on the basis that a miner never had the right to discharge nonpolluting mine waters, in itself, constitutes a taking and a violation of due process. *See Hughes v. State of Washington,* 389 US 290, 296-97, 88 S Ct 438, 19 L Ed 2d 530 (1967) (Justice Stewart concurring, in which he stated, "[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple

device of asserting retroactively that the property it has taken never existed at all."); *see also Stevens v. City of Cannon Beach*, 510 US 1207, 114 S Ct 1332, 1334, 127 L Ed 2d 679 (1994) (Justices Scalia and O'Connor dissenting from the court's denial to grant certiorari in 317 Or 131, 854 P2d 449 (1993)); Barton H. Thompson, Jr., "Judicial Takings," 76 Va L Rev 1449 (1990); David J. Bederman, "The Curious Resurrection of Custom: Beach Access and Judicial Takings, 96 Column L Rev 1375, 1438-42 (1996). Such a result should not stand.

Also supporting review in this case is that amicus curiae supporting both Kinross and the state have appeared below and are available to advise the court.

Finally, the issues at hand are properly presented in this case, and there are no factual disputes or procedural obstacles that might impede this Court's review. It is undisputed that the Three Basin Rule, as applied in this case,

barred Kinross from a discharge of water that otherwise would have met all state and federal water quality standards. In fact, it is undisputed that the proposed discharge in this case would not have been detectable more than a few thousand feet beyond the mixing zone. It also is undisputed that the effect of prohibiting such discharge prevented Kinross from mining its leased unpatented mining claim, which was the only economically viable use of the property interest. The issue presented to this Court is a legal one. There is no reason to defer review to allow for further exploration of the issue or development of additional facts in the trial court or the court of appeals. The question is concise and is here as fully framed as it could be in any adjudication.

G. CONCLUSION

This petition for review should be granted.

Dated this 17th day of November, 1999.

Respectfully submitted,

/S/ Phillip D. Chadsey
Philip D. Chadsey, OSB No. 66028
Jerry R. Fish, OSB No. 82255
James N. Westwood, OSB No. 74339
David E. Van't Hof, OSB No. 96185

Attorneys for Petitioner on Review
Kinross Copper Corporation

IN THE SUPREME COURT OF THE
STATE OF OREGON

KINROSS COPPER CORPORATION, Plaintiff-Appellant, Petitioner on Review,	)	Supreme Court No. S46982 Court of Appeals No. A98316
v.	)	(Multnomah County Circuit Court)
STATE OFOREGON Defendant-Respondent Respondent on Review.	)	TC No. 960906900

KINROSS COPPER CORPORATION'S
PETITION FOR RECONSIDERATION

Petition for Review of the Order of the
Supreme Court Denying Review of the
Decision of the Court of Appeals

Date of Order: February 29, 2000

This case has national significance. The highest court in Oregon should have the opportunity to be heard on the issues raised here. They will come before this Court and others again (and again) in the future. The issues arise here in the plainest and most timely context possible, allowing a clean and efficient analysis of fundamentally important questions. This Court has narrowly missed (by a single vote) the opportunity it should now reconsider and grasp. These are the issues:

1. Can an unpatented mining property right granted by federal law be abrogated by a state regulation that prevents the mine from discharging nonpolluting mine water, which meets state and federal drinking water standards, without requiring the state to pay just compensation for a "taking" under the Fifth Amendment's Taking Clause?

This question involves two subissues. The first is whether, because an unpatented mining claim has no

economic value unless it can be mined, petitioner is entitled to just compensation for its loss under Lucas v. South Carolina Coastal Council, 505 US 1003, 112 S Ct 2886, 120 L Ed 2d 798 (1992). The court of appeals decision in this case is in direct conflict with Skaw v. United States, 740 F2d 932 (Fed Cir 1984) (taking of unpatented mining claim), cert den 488 US 854 (1988), and Florida Rock Industries. Inc. v. United States, 791 F2d 893, 896, 904 (Fed Cir 1986) (taking of mining interest because federal government would not issue Clean Water Act permit when only harm to water quality was "short term" turbidity).

The second subissue is whether the subject regulation is preempted by federal law and, therefore, invalid under California Coastal Com'n v. Granite Rock Co., 480 US 572, 586-87, 107 S Ct 1419, 94 L Ed 2d 577 (1987) (state law cannot prohibit operation of mining claim on federal lands). If the subject regulation is preempted, petitioner is entitled to

just compensation for a temporary taking for the period it has been prohibited from mining its claim. First English Evan. Luth. Ch. v. Los Angeles Cty., 482 US 304, 107 S Ct 2378, 96 L Ed 2d 250 (1987).

2. Does takings jurisprudence require a property owner to show that it has a property interest in the very thing the state seeks to regulate, rather than merely showing that the effect of the regulation as applied to petitioner denies it all economic use of a federally recognized property right?

As pointed out in petitioner's petition for review, the issue is one of causation. Armstrong v. United States, 364 US 40, 46-48, 80 S Ct 1563, 4 L Ed 2d 1554 (1960). It is "the effect of the denial" that gives rise to a taking. United States v. Riverside Bayview Homes, Inc., 474 US 121, 127, 106 S Ct 455, 88 L Ed 2d 419 (1985); see also Jan G. Laitos, Law of Property Rights Protection: Limitations on Governmental Powers § 10.07[A][2] at 10-48 (Supp

2000) ("The plaintiff can establish adequate linkage between the government--defendant's actions and harm incurred if the government defendant authorized the act that brought about the taking, and the taking was the natural consequence, or cause, of the government-approved acts."). Or as Professor Laitos also states, courts use a "but for" test. Id. § 10.07[A] at 10-44. In this case, but for the state's refusal to grant an NPDES permit, petitioner would not have been denied all economic use of its mining claim.

3. Does the statement in Lucas that "'the proscribed use interests were not part of [plaintiff's] title to begin with[]' 505 US at 1027" allow the court of appeals to redefine the common law of this state to hold that a property owner never had the right to discharge nonpolluting mine water into a stream? Kinross Copper Corp. v. State of Oregon, 160 Or App 513, 519, 981 P2d 833 (1999).

There is no doubt that under the common law of this state a miner has always had the right to discharge nonpolluting mine waters into a stream. Provolt v. Bailey, 62 Or 58, 121 P 961 (1912); Carson v. Haves, 39 Or 97, 65 P 814 (1901). That right is a part of the bundle of property rights on federal lands that predate statehood. Atchison v. Peterson, 87 US (20 Wall) 507, 22 L Ed 414 (1874). This Court needs to make clear that the test of whether a property interest is a part of a landowner's "bundle of rights" to begin with is determined by whether the property owner's proposed activity could have been enjoined at common law as either a private or public nuisance. Lucas, 505 US at 1029-30. The test is not, as the court of appeals held, whether in order to discharge nonpolluting mine water the petitioner must first show a right to appropriate the water for a beneficial use. 160 Or App 522-25. The right to discharge and the right to appropriate water are governed by different sets of rules.

The state is now regularly taking the position in takings cases that based on Lucas "the proscribed use interests were not part of [plaintiff's] title to begin with," no matter how frivolous its position may be, when it is clear that the conduct that has been proscribed could not have been enjoined at common law as a nuisance. See Boise Cascade Core. v. Board of Forestry, 164 Or App 114, 127, 991 P2d 563 (1999) (as the court stated: "The state offers no authority for the proposition that knocking down a bird's nest on one's property has ever been considered a public nuisance."). Boise Cascade is presently still before the court of appeals on the state's motion for rehearing; that case will shortly be before this Court on a petition for review, since the court of appeals has already denied a motion for rehearing from the plaintiff.

The retroactive holding of the court of appeals that plaintiff never had the right to discharge nonpolluting mine

water into a stream, to avoid finding a taking, is in itself a judicial taking that this Court should not let stand. Hughes v. State of Washington, 389 US 290, 296-97, 88 S Ct 438, 19 L Ed 2d 530 (1967) (Stewart, J, concurring). This Court needs to make clear to the lower courts of this state that property rights cannot be taken away without the payment of just compensation by merely reinterpreting the common law of property to avoid a taking. See Stevens v. City of Cannon Beach, 510 US 1207, 114 S Ct 1332, 1334, 127 L Ed 2d 679 (1994) (Scalia and O'Connor, JJ, dissenting). The issue of judicial takings by means of reinterpreting, or in this case ignoring, common law precedents is an important one that has seldom been addressed by the courts. See Robinson v. Ariyoshi, 753 F2d 1468, 1474 (9th Cir 1985) (Goodwin, J), (change in rules governing state's water law cannot divest real property rights that were vested before state supreme court announced new law without constituting taking

requiring payment of compensation), cert granted, rev'd on other grounds 477 US 902 (1986); see also Laitos, supra, § 8.02[E];[1] Barton H. Thompson, Jr., "Judicial Takings," 76 Va

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[1] Professor Laitos gives the following example of a judicial taking that closely parallels the reasoning of the court of appeals in this case:

> "For example, assume that a property owner discovers that his land has been inundated by water released by a neighbor whose land is uphill from the owner's land. The downhill owner brings a common law trespass action against the uphill neighbor. A court rules, as a matter of common law, that the downhill owner never had property in the now-flooded land because that land was a wetland. The court further rules that if wetlands exist on private land, they are public property due to their ecological and environmental importance, and are not part of the title of the private owner's land. Since the downhill owner does not, as a result of this court decision, have common law private 'property' in his flooded land, he cannot bring a trespass action against the uphill neighbor. The downhill owner can then allege that the court ruling has worked judicial taking of his land, as it has made his private property become public property without compensation." Jan G. Laitos, Law of Property Rights Protection: Limitations on Governmental Powers § 802[E] at 8-23 to 8-24 (Supp 2000) (emphasis added).

L Rev 1449 (1990); David J. Bederman, "The Curious Resurrection of Custom: Beach Access and Judicial Takings," 96 Colum L Rev 1375, 1438-42 (1996).

Dated this 14th day of March, 2000.

Respectfully submitted,

/S/ Phillip D. Chadsey
Phillip D. Chadsey, OSB No. 66028
James N. Westwood, OSB No. 74339
Jerry R. Fish, OSB No. 82255
Charles F. Adams, OSB No. 75402
David E. Van't Hof, OSB No. 96185

Attorneys for Petitioner for Reconsideration
Kinross Copper Corporation

IN THE CIRCUIT COURT OF THE
STATE OF OREGON FOR THE
COUNTY OF MULTNOMAH

KINROSS COPPER CORPORATION, a foreign corporation,	)	Case No. 9609-06900
Plaintiff,	)	STIPULATED STATEMENT OF FACTS
v.	)	
STATE OF OREGON,	)	
Defendant.	)	

Except as noted, the parties hereby stipulate to the accuracy and relevancy of the following facts:

1. Plaintiff is the lessee of mining claims located in the Cedar Creek Valley of the North Santiam River Subbasin in the Willamette National Forest, which it leased under its former name, Plexus, Inc. ("Plexus"), from Cyprus Metals Exploration Corporation ("Cyprus"). That lease occurred in 1989. Under its terms plaintiff is required to pay Cyprus an annual rental fee and once the mine went into

operation a production royalty based on the net value of the ore mined. It is anticipated that the mine would produce approximately 360,000 tons annually and have a productive life of eight years.

2. Cyprus was formerly known as Amoco Minerals Co. ("Amoco"), which in 1975 staked the subject claims. Amoco through the use of several methods for geological exploration discovered a high grade copper ore body on the claims in 1976.

3. Effective January 22, 1977, defendant, through its Environmental Quality Commission ("EQC"), adopted OAR 340-41-470(1), which is now known as the Three Basin Rule, that prohibited wastewater discharges in the McKenzie, Clackamas, and North Santiam River subbasins.

4. In 1991, Plexus submitted a Plan of Operations for what was called the "Bornite [a copper ore]

Project" to USFS for approval. On April 22, 1993, the Forest Supervisor of the Willamette National Forest adopted a ROD and FEIS. The ROD and FEIS recognized that to operate the mine, plaintiff would be required to obtain from defendant a National Pollutant Discharge Elimination System ("NPDES") permit. The obtaining of applicable state permits, including a NPDES permit, was made a condition by USFS's final approval of the Plan of Operations for the Bornite Project.

5. While the Bornite Project was undergoing review by USFS, on July 22, 1992, Plexus submitted to Department of Environmental Quality ("DEQ") applications for an NPDES permit and for a Water Pollution Control Facility ("WPCF") permit that would allow it to discharge groundwater pumped from the mine and other wastewater from the Bornite Project. Subsequently, the DEQ returned the application for an WPCF permit on the basis that all

discharges from the Bornite Project would be included in the NPDES permit.

6. (Defendant admits the accuracy, but disputes the relevancy of the following facts.) In a memorandum dated December 10, 1993, DEQ advised EQC that an NPDES permit for the Bornite Project could be issued under conditions where "there would be no measurable impact on the North Santiam River or the Little North Santiam River" but that it was prohibited from doing so because of the "Three Basin Rule" contained in OAR 340-41-470(1). In that same memorandum, DEQ also advised EQC that plaintiff required an NPDES permit to proceed with the mining project but that it could not do so under literal reading of the Three Basin Rule because

> "the rule language is broad and effectively prevents the issuance of permits for any new facilities (including new facilities requiring storm water permits) regardless of the impact of the discharge. The rule may effectively preclude development and other activities in

> these areas that were not intended to be affected by the rule."

EQC was further advised that the Three Basin Rule

> "prohibits development requiring a discharge permit, regardless of the impact on water quality. No exceptions are allowed. This rule, together with the requirements for storm water permits, may have the effect of precluding activities and land uses in these subbasins that were never intended to be precluded."

7. (Defendant admits the accuracy, but disputes the relevancy of the following facts.) On January 21, 1994, DEQ in a second memorandum to EQC made the following findings:

> "OAR 340-41-470(1) is more stringent than required by the Clean Water Act or federal rules because it prohibits any new or increased discharges into the Clackamas, North Santiam and McKenzie river sub basins. This is more than is required to meet water quality standards and protect beneficial uses and more than what is required by the federal anti-degradation rule, 40 CFR 131.12.
>
> "All of the rule amendment alternatives included in this staff report, while allowing various levels of relaxation of the

current rule, would still result in a rule, if adopted, that is more stringent than required by federal law or rules."

8. (Defendant admits the accuracy, but disputes the relevancy of the following facts.) Referring to the Bornite Project, DEQ specifically found:

A. "The Department conducted a mass balance analysis to determine whether the existing level of water quality will be 'maintained and protected' (Attachment C). The analysis indicates that the discharge, after mixing with the stream, would be well below the most stringent water quality standards, chronic toxicity. Therefore, water quality standards would not be violated and beneficial uses would be protected. However, there would be a measurable increase in background levels [of substances] at the downstream edge of the mixing zone for some parameters. A few thousand feet downstream of the mixing zone, the Kinross discharge would not be measurable.

B. "As required by section (3)(a) of OAR 340-41-026, the Department has determined that (A) the new discharge load would not cause water quality standards to be violated; (B) the new discharge load would not unacceptably threaten or impair any recognized beneficial uses; (C) the new

discharged load is not to a water quality limited stream; and (D) the activity is consistent with acknowledged local land use plans as evidenced by submission of a land use compatibility statement to the Department.

C. "A non-discharge alternative such as spray irrigation is not viable because of the steep terrain and because irrigation would be during the wet weather season. Since the proposed mine is located on a steep hill side in the Willamette National Forest, installing a irrigation system may not be practicable and may negatively impact both surface water and groundwater quality. Furthermore, spray irrigation would primarily be during the wet weather season when the capacity of the soil to assimilate the waste water is at a minimum. Irrigating under these conditions would increase run-off and impact surface waters. These conditions would not lend themselves to a non-discharge alternative such as spray irrigation.

D. "[D]ue to the heavy precipitation in the area and the potential for encountering high volumes of groundwater during the mining operation, Kinross would not be able to develop and operate the mine without a NPDES waste discharge permit."

9. (Defendant denies both the accuracy and the relevancy of the following facts.) In February 1995, EQC

amended the Three Basin Rule to permit some types of nonindustrial wastewater discharges but added a new provision to the rule making it applicable to WPCF permits and prohibiting discharges from industrial sources that have any measurable effect on surface water.

OAR 340-41-470(7)(b)(B).

10. On March 21, 1995, DEQ denied plaintiff an NPDES permit because OAR 340-41-470 (the Three Basin Rule) does not allow for the discharge of any industrial process water within the waters of the North Santiam River Subbasin. On April 7, 1995, plaintiff requested a contested case hearing before EQC on the denial of its application. On August 30, 1996, EQC issued a final order denying plaintiff's application for an NPDES permit.

11. To date plaintiff and its predecessors have spent a substantial amount of money on exploration,

development, and permitting costs for the Bornite Project since the claims were staked in 1975.

12. (Defendant denies both the accuracy and relevancy of the following, unless the words "as designed" are inserted after the word mine.) DEQ's denial of the NPDES permit application prevents plaintiff from developing the mine and has deprived plaintiff of all economically beneficial or productive uses of its mining claims.

/S/ Phillip D. Chadsey
Phillip D. Chadsey, OSB No. 66028
Of Attorneys for Plaintiff

Dated: March 27, 1997

/S/ Denise G. Fjordbeck
Denise G. Fjordbeck, OSB No. 82257
Of Attorneys for Defendant

Dated: March 27, 1997

CLEAN WATER ACT

40 CFR §440.104(b)(2)(i) (1999)
New source performance standards (NSPS)

(2)(i) In the event that the annual precipitation falling on the treatment facility and the drainage area contributing surface runoff to the treatment facility exceeds the annual evaporation, a volume of water equal to the difference between annual precipitation falling on the treatment facility and the drainage area contributing surface runoff to the treatment facility and annual evaporation may be discharged subject to the limitations set forth in paragraph (a) of this section.

LAND USE PLANS

43 USC §1712(c)(8) (West 1986)

(c) Criteria for development and revision.

In the development and revision of land use plans, the Secretary shall:

(8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans.

THREE BASIN RULE (as originally adopted)

OAR 340-41-470

(1) In order to preserve the existing high quality water for municipal water supplies and recreation, it is the policy of the EQC to prohibit any further waste discharges to the waters of:

(a) The Clackamas River Subbasin;

(b) The McKenzie River Subbasin above the Hayden Bridge (river mile 15);

(c) The North Santiam River Subbasin.

(2) The Environmental Quality Commission shall investigate, together with any other affected state agencies, the means of maintaining at least existing minimum flow during the summer low flow period.

THREE BASIN RULE (as amended)

OAR 340-041-0470(1)-(7)

(1) In order to preserve or improve the existing high quality water for municipal water supplies, recreation, and preservation of aquatic life, new or increased waste discharges shall be prohibited, except as provided by this rule, to the waters of:

(a) The Clackamas River Subbasin;

(b) The McKenzie River Subbasin above the Hayden Bridge (river mile 15);

(c) The North Santiam River Subbasin.

(2) Except as otherwise provided for in this rule, this rule becomes effective and applies to all permits pending or applied for after the date of filing with the Secretary of State. For purposes of sections (1) through (7) of this rule, the following definitions apply:

(a) "Waste Discharges" are defined to mean any discharge that requires and NPDES permit, WPCF permit, or 401 Certification. Individual on-site sewage disposal systems subject to issuance of a construction-installation permit; domestic sewage facilities that discharge less than 5,000 gallons per day under WPCF permit; biosolids land applied within agronomic loading rates pursuant to OAR Chapter 340, Division 50; and reclaimed domestic waste water land applied at agronomic rates pursuant to OAR Chapter 340, Division 55 are excluded from this definition;

(b) "Existing Discharges" are defined as those discharges from point sources which existed prior to January 28, 1994;

(c) "Existing Facilities" are defined as those for which construction started prior to January 28, 1994. Where existing facilities are exempted from requirements placed on new facilities, the exemption applies only to the specific permit(s) addressed in the subsection which allows the exemption;

(d) "New" NPDES and WPCF permits are defined to include permits for potential or existing discharges which did not previously have a permit, and existing discharges which have a permit, but request an increased load limitation;

(e) "Agronomic Loading Rate" means the application of biosolids or reclaimed effluent to the land at a rate which is designed to:

(A) Provide the quantity of plant nutrients, usually nitrogen, needed by a food crop, feed crop, fiber crop, cover crop or other vegetation grown on the land; and

(B) To minimize the quantity of nitrogen or other nutrients from the land applied materials that passes below the root zone of the crop or vegetation grown on the land to groundwater.

(f) "Biosolids" means solids derived from primary, secondary, or advanced treatment of domestic wastewater which have been treated through one or more controlled processes that significantly reduce pathogens and reduce volatile solids or chemical stabilize solids to the extent that they do not attract vectors. This term refers to domestic wastewater

treatment facility solids that have undergone adequate treatment to permit their land application;

(g) "Reclaimed Wastewater" means treated effluent from a domestic wastewater treatment system which, as a result of treatment, is suitable for a direct beneficial purpose or a controlled use that could not otherwise occur.

(3) To respond to emergencies or to otherwise avoid imminent serious danger to public health or welfare, the Director or designee may allow lower water quality on a short-term basis.

(4) The Director or a designee may renew or transfer NPDES and WPCF permits for existing facilities. Existing facilities with NPDES permit may not be granted increases in their permitted mass load limitations. The following restrictions and exceptions apply:

(a) The Department shall conduct an inspection prior to permit renewal. Existing sources with general permits who are found not to qualify for a general permit, and who wish to continue discharging, shall be required to apply for an individual permit;

(b) Fish hatcheries (General Permit 300) and log ponds (General Permit 400) shall be required to apply for an individual permit at the time of permit renewal;

(c) Additional industrial, confined animal feeding operations, or domestic waste loads that are irrigated on land at agronomic rates or that otherwise meet the conditions of section (7) of this rule shall not be considered an increase in the permitted wasteload.

(5) The Director or a designee may issue the following General Permits or Certifications subject to the conditions of the Permit or Certification:

(a) Storm water construction activities (General Permits 1200C and 1200CA);

(b) Underground storage tank cleanups using best available treatment technology (General Permit 1500);

(c) Non-contact cooling water (General Permit 100);

(d) Filter backwash (General Permit 200);

(e) Boiler blowdown water (General Permit 500);

(f) Suction dredging (General Permit 700) only in portions of the basins that are not designated as Scenic Waterways under ORS 390.805 to 390.925;

(g) Federal Clean Water Act Section 401 water quality certifications;

(6) Long-term general and individual storm water permits may be allowed as required by State and/or Federal law. The following requirements apply:

(a) New storm water discharge permittees shall maintain a monitoring and water quality evaluation program which is effective in evaluation of the in-stream water quality impacts of the discharge; and

(b) When sufficient data is available to do so, the Department shall assess the water quality impacts of storm water discharges. Within a subbasin, if the proportion of total degradation that is contributed by the storm water is determined to be significant compared to that of other permitted sources, or if the Department determines that reducing degradation due to storm water is cost-effective when compared to other available pollution control options, the Department may institute regulatory mechanisms or modify permit conditions to require control technologies and/or practices which result in protection that is greater than that required statewide.

(7) Industrial waste discharge sources, confined animal feeding operations, and domestic sewage treatment facilities shall meet the following conditions:

(a) No NPDES permits for new industrial or new confined animal feeding operation waste discharges, or new domestic sewage treatment facilities shall be issued, except as allowed under section (3), (4), (5), and (6) of this rule;

(b) The Department may issue WPCF permits for new industrial or confined animal feeding operation waste discharges provided;

(A) There is no waste discharge to surface water; and

(B) All groundwater quality protection requirements of OAR 340-040-0030 are met. Neither the Department nor the Commission shall grant a concentration limit variance as provided in OAR 340-040-0030, unless the Commission finds that all appropriate groundwater quality protection requirements and compliance monitoring are met and

there will be no measurable change in the water quality of the surface water that would be potentially affected by the proposed facility. For any variance request, a public hearing shall be held prior to Commission action on the request.

(c) The Department may issue WPCF permits for new domestic sewage treatment facilities provided there is no waste discharge to surface water and provided:

(A) All groundwater quality protection requirements of OAR 340-040-0030 are met. Neither the Department nor the Commission shall grant a concentration limit variance as provided in OAR 340-040-0030, unless the Commission finds that all appropriate groundwater quality protection requirements and compliance monitoring are met and there will be no measurable change in the water quality of the surface water that would be potentially affected by the proposed facility. For any variance request, a public hearing shall be held and the permit application will be evaluated according to paragraphs (B) and (C) of this subsection;

(B) The Commission finds that the proposed, new domestic sewage treatment facility provides a preferable means of sewage collection, treatment and disposal as compared to individual on-site sewage disposal systems. To be preferable, the Commission shall find that one of the following criteria applies:

(i) The new sewage treatment facility will eliminate a significant number of failing individual on-site sewage disposal systems that cannot be otherwise reliably and cost-effectively repaired; or

(ii) The new sewage treatment facility will treat domestic sewage that would otherwise be treated by individual on-site sewage disposal systems, from which the cumulative impact to groundwater is projected to be greater than that from the new facility; or

(iii) If an individual on-site sewage disposal system, or several such systems, would not normally be utilized, a new sewage treatment facility may be allowed if the Commission finds that the social and economic benefits of the discharge outweigh the possible environmental impacts.

(C) Applicants for domestic wastewater WPCF permits must meet the following requirements:

(i) Application must be for an individual permit; and

(ii) The proposed discharge must not include wastes that incapacitate the treatment system; and

(iii) The facility must be operated or supervised by a certified wastewater treatment plant operator as required in OAR 340-049-0015, except as exempted by ORS 448.430; and

(iv) Annual written certification of proper treatment and disposal system operation shall be obtained from a qualified Registered Sanitarian, Professional Engineer, or certified wastewater treatment system operator.